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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23.

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,
Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,
Respondent.

SUPPLEMENT TO APPENDIX TO RESPONDENT'S BRIEF.

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Chicago, Illinois.

LAWRENCE CAKE,
Washington, D. C.

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Phoenix, Arizona.

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MAX RADIN,
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1211 Railway Exchange,
Chicago, Illinois, November 10, 1941.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. Extract from Report on the Subject of Land Titles in California.

(MADE IN PURSUANCE OF INSTRUCTIONS FROM THE SECRETARY OF STATE AND THE SECRETARY OF THE INTERIOR, BY WILLIAM CAREY JONES)

(Senate Ex. Doc. 18, 31st Cong., 2d Sess., Cong. Doc Series 589)

I am also instructed to make "an inquiry into the nature of the *Indian rights* (in the soil) under the Spanish and Mexican governments."

It is a principle constantly laid down in the Spanish colonial laws, that the Indians shall have a *right* to as much land as they need for their habitations, for tillage, and for the pasturage of their flocks. When they were already partially settled in communities, sufficient of the land which they occupied was secured them for those purposes. If they were wild and scattered in the mountains and wildernesses, the policy of the law, and the instructions impressed on the authorities of the distant provinces, was to reduce them, establish them in villages, convert them to Christianity, and instruct them in useful employment. California was not excepted from the operations of this rule. It was for this purpose especially that the missions were founded and encouraged. The instructions, heretofore quoted, given to the commandant of Upper California in August, 1773, enjoin on that functionary that "the reduction of the Indians in population as the spiritual conquests advance, shall be one of his principal cares;" that, the reduction made, "and as rapidly as it proceeds, it is important for their preservation and augmentation to congregate them in mission settlements, in order that they may be civilized and led to a rational life; which (adds the instructions) is impossible if they be left to live dispersed in the mountains" (p. 32).

* * * * * * * * * *

In the wild or wandering tribes, the Spanish law does not recognise any title whatever to the soil (p. 34).

(This report was submitted to the Congress by the Secretary of the Interior on April 22, 1850. Sen. Ex. Doc. 18, 31st Cong., 2d Sess., p. 1.)

Note.—In House Ex. Doc. 17 of the 31st Cong., 1st Sess., Cong. Doc. Series 573, are contained documents showing the selection of William Carey Jones "as a lawyer well skilled in the Spanish colonial titles" by the Secretary of the Interior and the Secretary of State for the purpose of obtaining reliable information as to the condition of land titles in California, to enable the Secretary of the Interior

to submit a report thereon to the Congress at its next session. At the request of the Secretary of the Interior, the Commissioner of the General Land Office instructed Mr. Jones as to the matters to be considered by him. He was not only to investigate the condition of titles based on grants from the Spanish and Mexican governments but was also to inquire into the nature of "Indian rights" as they existed under the Spanish and Mexican governments. See pages 112-115.

II. Memorial from the Territorial Legislature of Arizona, Dated November 7, 1864, Appearing in the Congressional Globe for March 2, 1865, 38th Congress, 2d Session, page 1320.

To the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, the Council and House of Representatives of the Legislative Assembly of the Territory of Arizona respectfully represent, that the four tribes of Indians known as the Yapapais, Hualapais, Mojaves, and Yumas, numbering about ten thousand, are now scattered over an extent of country from the Gila river on the south to the northern boundary of the Territory, and from the Colorado river on the west to the Rio Verde on the east; that these Indians are now roaming at large over the vast territory above described, gaining a precarious subsistence from the small patches of land along the Colorado river, which they cultivate, and from fishing and hunting; that when the seasons are unfavorable to their little farming interests, or the Colorado river does not overflow to irrigate and enrich their fields, they are reduced to a starving condition, and compelled, by necessity, to make raids upon the stock and property of the whites, and not unfrequently do they ambush the traveler and miner, and waylay and stampede the stock of trains and plunder their packs and wagons; that the whites are settling up the country, and necessarily diminishing their means of subsistence, and increasing the dangers of a collision with them; that the late superintendent of Indian

affairs of the Territory, Hon. Charles D. Poston, in view of their scattered and destitute condition, selected and caused to be laid off, on the east bank and bottom of the Colorado river, a reservation ample enough for the accommodation and support of all the above-named tribes; that an irrigating canal can be constructed at an expense of a small amount (the Indians performing the labor) that will render highly productive a large tract of land that will yield an abundance for their support, and afford a large surplus to be disposed of for their education and improvement; that when placed upon said reservation they can, under judicious management, be made not only self-sustaining, but to produce largely for the market; that, to enable those who may be placed over them or have charge of them to open said canal, to remove them upon said reservation, and sustain them until they can, by their own labor, provide enough for their subsistence, your memorialists respectfully ask of your honorable body an appropriation of $150,000; that to secure the attention and favorable consideration of the subject and matters of this memorial by the Congress of the United States,

Be it resolved by the Legislative Assembly of the Territory of Arizona, That our Delegate in Congress, Hon. Charles D. Poston, be requested to use all honorable means to bring the subject before Congress.

And be it further resolved, That his Excellency the Governor of the Territory of Arizona be requested to forward this memorial, together with such other information touching the subject as he may have in his possession, to Hon. Charles D. Poston, our Delegate in Congress.

W. Claude Jones,
Speaker of the House of Representatives.

Coles Bashford,
President of the Council.

Approved November 7, 1864.

John M. Goodwin.

III. Letters Showing Administration of the Act of 1866.

. . . . . .

"Department of the Interior,
"General Land Office,
Washington, D. C., May 17th, 1872.

"Register and receiver, Prescott, Arizona, T'y.

"Gentlemen: I transmit herewith a diagram showing the location of the Atlantic and Pacific railroad through the Territory of Arizona, from the eastern to the western boundaries, showing also the forty and fifty mile limits of the land grant thereto, under act of Congress approved July 27, 1866; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road was designated by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the forty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that price, and under the pre-emption and homestead laws only. The even sections outside of the forty-mile limits are not affected by this withdrawal, nor are the claims of pre-emption settlers initiated prior to the right of the road attaching, March 12, 1872, affected by it.

"You will please acknowledge the receipt of this letter without delay.

"Very respectfully,

"WILLIS DRUMMOND,
"*Commissioner.*"

Record
(Page 38 of Record, *Atlantic and Pacific Rr. Co.* v. *Mingus*, 165 U. S. 413—)

"Department of the Interior,
"General Land Office,
"Washington, D. C., Feb. 23d, 1881.

"E. F. Winslow, Esq., vice-president Atlantic and Pacific Railroad Company, Drexel building, cor. Wall and Broad streets, New York city.

"Sir: I am in receipt of your letter of 15th instant, stating that your financial agents, Messrs. Seligman and Co., desire 'an official statement of the number of acres of land to which the Atlantic and Pacific Railroad Company will be entitled upon completion of its road from the west boundary line of Missouri to San Francisco.'

* * * * * * * * * * *

"From the west line of Texas the main line, as located, runs through the Territory of New Mexico, about 416 miles, to the east line of Arizona Territory, and thence through Arizona, about 380 miles, to the west line thereof.

"Through these Territories the amount of the grant is about 20,377,600 acres. The land is for the greater part unsurveyed, and I see no reason why, out of the land reserved for the grant, the same may not be entirely satisfied as to this part of the line and yet have a very large quantity in the 'i-demnity' limits applicable to losses elsewhere.

"Very respectfully,

"J. A. Williamson,
"*Commissioner.*"

(At pages 86 to 89 of the Mingus record above cited)

IV. Legislative Background of the Act of 1904 (33 Stat. 189, 211), Permitting Exchanges of Private Land Within Indian Reservations (for text see Appendix, p. 62).

Senate Report No. 806, 58th Congress, 2d Session.

TITLE TO LANDS IN CERTAIN INDIAN RESERVATIONS.

The Committee on Indian Affairs submitted the following report to accompany S. 3205, authorizing the Secretary of the Interior to acquire the title to lands within certain Indian reservations:

This bill was taken from a letter signed by the Commissioner of Indian Affairs and the Secretary of the Interior, dated January 12, 1903 . . . As stated in that letter in the Territories of Arizona and New Mexico there are Indian reservations in which the alternate even-numbered sections are owned by the Government, and the alternate odd-numbered sections are held in private ownership under the Atlantic & Pacific Railroad land grant. This situation is peculiar to certain reservations in Arizona and New Mexico and arises from the fact that after the definite location of the line of the Atlantic & Pacific Railroad, and therefore after the right of the railroad company to alternate odd-numbered sections had become vested and had passed beyond the control of the legislative or executive branch of the Government, certain Indian reservations were established within the limits of this railroad land grant, and certain other existing reservations were enlarged so as to include lands within the limits of this grant.

This resulted in a divided ownership, and a divided authority within the limits of these Indian reservations. This is destructive of the authority of the United States within the reservations, and is alike injurious to the Indians and other owners of the rail oad lands. It works a serious injustice to those holding the railroad title, because while compelled to pay county and Territorial taxes upon their alternate odd-numbered sections, they are unable to use them without coming in conflict with the Government's authority over and the Indians' use of the alternate even-numbered sections. It is especially desirable that this situation be changed. The Government, the Indians, and the owners of these private lands will be mutually benefited thereby.

The bill contains safeguards which amply protect the Government and the Indians and effectually preclude injury to the individuals. Exchange is not compulsory on the Government, and can be made only where it is deemed advisable by the Secretary of the Interior. Equality in advantages resulting from exchange is assured. No exchange can be made which increases the acreage of any private owner or diminishes that of the Government or which changes the character or value of the lands held in public or in private ownership, or by which the Government surrenders any mineral or timber lands. No roaming right of lieu selection is given, and no land scrip can be issued. The lands to be given in exchange by the Government are confined to surveyed public lands in the same territory, and the authorization extends only to obtaining full governmental ownership of all the lands within these Indian reservations.

Letters from the honorable Secretary of the Interior and the Commissioner of Indian Affairs are appended hereto and made a part of this report.

Department of the Interior
Washington, January 21, 1904

Sir:

I have the honor to acknowledge the receipt by your reference of the 12th instant, of S. 3205 . . .

The object of this bill is to authorize the exchange of vacant public lands in Arizona and New Mexico, nor mineral nor timbered, for private lands within the land grant to the Atlantic & Pacific Railroad Company of like area and value and located within Indian reservations in said Territories.

Legislation as contained in this act was recommended by the department, January 12, 1903, in a letter addressed to the Chairman of the Committee on Indian Affairs, House of Representatives, a copy of which is enclosed for your information.

I transmit herewith copy of Indian Office report on this bill, and recommend that the bill be enacted into law.

Very respectfully,

E. A. Hitchcock,
Secretary.

The Chairman Committee on Indian Affairs,
United States Senate

Department of Interior, Office of Indian Affairs, Washington, January 20, 1904

Sir:

• • • The object of the bill is to authorize the Secretary of the Interior, in his discretion, to exchange surveyed public lands in the Territories of New Mexico and Arizona which are vacant, unappropriated, not mineral, and not timbered, for private lands included within the grant to the Atlantic & Pacific Railroad Company of like area and value and located within Indian reservations in said Territories, thereby obtaining for governmental ownership all the lands within such Indian reservation.

Section 2 of the act provides that the railroad company or its grantee must, at its expense and by appropriate instruments of conveyance, surrender to the Government the full and unencumbered right and title to the private lands included in any exchange before patents are issued for the public lands included therein, and that no charge of any kind shall be made for issuing such patents.

This section further provides that upon the completion of any exchange the lands surrendered to the Government thereunder shall become part of the Indian reservation within the limits of which they are situate, and that nothing contained in said bill shall in any manner be so construed as to authorize the issuance of any land scrip or to enlarge the quantity of land to which said railroad company or any of its grantees may be entitled under existing law.

This bill is evidently taken from office letter of January 12, 1903, to which is attached your signature, addressed to the Chairman of the Committee on Indian Affairs, House of Representatives, in which it was recommended that certain provisions should be inserted in the Indian appropriation bill then pending, or that such provisions be made the subject of an independent bill as might be deemed most advisable, for the relieving of the situation resulting from such joint ownership of the lands included within these Indian reservations. It was stated at that time that the provisions suggested, which are incorporated in the bill herewith, would meet the existing situation and contained safeguards which amply protected the Government, and the Indians, and effectually precluded injury to the individuals.

There has been no change in the conditions existing at the date of my letter of January 12, 1903, and I therefore recommend that the bill herewith be enacted into law.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

The Secretary of the Interior

Department of the Interior,
Washington, January 12, 1903

Sir:

Recently you informally called to the attention of the Commissioner of Indian Affairs the fact that in the Territories of Arizona and New Mexico there are Indian reservations in which the alternate even-numbered sections are owned by the Government and the alternate odd-numbered sections are held in private ownership under the Atlantic & Pacific Railroad land grant. This situation is indeed an unfortunate one, and is peculiar to certain reservations in Arizona and New Mexico. It arises from the fact that after the definite location of the line of the Atlantic & Pacific, and therefore, after the right of the railroad company to the alternate odd-numbered sections had become vested and had passed beyond the controls of the legislative or executive branch of the Government, certain Indian reservations were established within the limits of this railroad land grant, and certain other existing reservations were enlarged so as to include lands within the limits of said grant.

The result is that there is a divided ownership and a divided authority within the limits of these Indian reservations. This is destructive of the authority of the United States within the reservations, and is alike injurious to the Indians and other owners of the railroad lands. It works a serious injustice to those holding the railroad title, because, while compelled to pay county and Territorial taxes upon their alternate odd-numbered sections, they are unable to use them without coming in conflict with the Government's authority over and the Indians' use of the alternate even-numbered sections. It is especially desirable that this situation be changed. The Government, the Indians, and the owners of these private lands will be mutually benefited thereby. We respectfully recommend that the following provision for relieving this situation be inserted in the pending Indian appropriation bill, or be made

the subject of an independent bill, as may be deemed most advisable.

Wherever and to the extent that any of the lands within the place limits of the land grants to the Atlantic & Pacific Railroad Company within the Territories of Arizona and New Mexico were placed within any Indian reservation after the dates when the right of the Railroad Company had attached by the definite location of its line of railroad opposite thereto, and are still embraced within such Indian reservation, the Secretary of the Interior shall be duly authorized, in his discretion, to exchange surveyed public lands in the same Territory which are vacant, unappropriated, not mineral, and not timbered, for private lands in such reservation of like area and value in the alternate sections granted to the railroad company, so far as may be necessary to obtain full governmental ownership of all the lands within such Indian reservation. The railroad company or its grantee must, at its expense and by appropriate instruments of conveyance, surrender to the Government the full and unencumbered right and title to the private lands included in any exchange before patents are issued for the public lands included therein, and no charge of any kind shall be made for issuing such patents. Upon the completion of any exchange, the lands surrendered to the Government thereunder shall become a part of the Indian reservation within the limit of which they are situate. Nothing herein shall in any manner be so construed as to authorize the issuance of any land scrip, or to enlarge the quantity of land to which such railroad company or any of its grantees may be entitled under existing law.

We believe this provision fully meets the existing situation and contains safeguards which amply protect the Government and the Indians and effectually preclude injury to individuals. Equality in advantages resulting from every exchange is assured. Exchange is not compulsory on the Government and can be made only where it is deemed advisable by the Secretary of the Interior. No exchange

can be made for increasing the acreage of any private owner or diminishing that of the Government, or which changes the character or value of the lands held in public or private ownership, or by which the Government surrenders any minerals or timber lands. No roaming right of lieu selection is given, and no land scrip can be issued. The lands to be given in exchange by the Government are in the same Territory, and the authorization extends only to obtaining full governmental ownership of all the lands within these Indian reservations.

We sincerely trust that the provisions here proposed will receive the favorable consideration of Congress.

Very respectfully,

W. A. JONES,
Commissioner of Indian Affairs.

E. A. HITCHCOCK,
Secretary of the Interior.

The Chairman of the Committee on Indian Affairs,
House of Representatives.

[Chicago Public Library No. 4572]

V. The Act of March 4, 1913 (37 Stat. 1007), for the Relief of Indians Occupying Railroad Lands in Arizona, New Mexico, or California (for Text See Appendix, p. 66), Statutes extending the Last-Named Act, and Pertinent Legislative History.

This Act was extended by various Acts of Congress in 1916 (39 Stat. 48), 1919 (41 Stat. 9), 1922 (42 Stat. 994), 1925 (43 Stat. 795), 1928 (45 Stat. 299). The report on which the Act of March 10, 1928, last referred to, was enacted, was Senate Report 262 of February 8, 1928, as follows:

SENATE REPORT NO. 262.

To Amend an Act Entitled "An Act for the Relief of Indians Occupying Railroad Lands in Arizona, New Mexico, or California"

February 8, 1928.—Ordered to be printed.

Mr. Frazier, from the Committee on Indian Affairs, submitted the following

Report

[To accompany S. 2154]

The Committee on Indian Affairs, to whom was referred the bill (S. 2154) to amend an act entitled "An act for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California," approved March 4, 1913, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

In line 8 strike out the figures "1929" and substitute in lieu thereof the figures "1931."

This bill is recommended by the department, as is shown in letter from the Acting Secretary of the Interior under date of December 29, 1927, which is attached hereto and made a part of this report.

Department of the Interior,
Washington, December 29, 1927.

"*Hon. Lynn J. Frazier,*
Chairman Committee on Indian Affairs,
United States Senate.

My Dear Senator Frazier:

The Act of March 4, 1913 (37 Stat. 1007), makes provision by which Indians who had occupied lands within railroad grants in Arizona, New Mexico, and California for a period of five years or more prior to the date of that act might receive such tracts as allotments, if they were eligible under the provisions of section 4 of the act of February 8, 1887 (24 Stat. 388), as amended; upon the acceptance by the railroad company of other land on the public domain in lieu thereof. The provisions of that act were to run for a period of three years. These provisions have been extended from time to time by subsequent acts of Congress, the last extension authorized by the act of January 29, 1925 (43 Stat. 795), expiring March 4, 1927.

It had been hoped to complete the work of exchanging public-domain lands for the benefit of Indians residing on railroad grants before the date last above mentioned, but the effort was not successful. The railroad companies seldom select lieu lands for their own use but merely sell the right of selection, and the exchanges were greatly retarded by a decrease in the demand for agricultural and grazing lands. Because of these conditions the attitude of the railroad officials concerning exchanges under the above-mentioned act has not been so liberal in the last few years as formerly. This condition has resulted in the rejection of numerous Indian allotment applications embracing railroad-grant lands during the period of extension authorized by the act of January 29, 1925, *supra*, and only one exhange was perfected during that time under the act mentioned, covering a 40-acre tract in New Mexico. Prior to that time a total of approximately 18,000 acres was exchanged for

the benefit of Indians in Arizona and New Mexico and 160 acres in California. In this connection it will be observed that the act of March 4, 1913, *supra*, is merely permissive and not mandatory, the exchanges authorized being entirely dependent upon the willingness of the railroad company to relinquish and accept other lands in lieu.

It has recently been brought to the attention of this department that a number of Walapai Indians have been for a number of years occupying and cultivating a railroad owned section in Mohave County, Ariz., about 30 miles southeast of Kingman, on which they have erected valuable improvements. Officials of the Santa Fe Pacific Railway Co. have expressed a willingness to relinquish the entire section to the United States and select other land in lieu thereof, provided the necessary authority of law is procured, in order that the Indians may obtain title to the land occupied by them and receive trust patents therefor.

The facts disclosed by correspondence on file indicate that the Indians concerned are industrious and worthy, and it is the belief of this department that an extension should be authorized for their relief and benefit. In no other way can they hope to obtain title to the lands they have occupied and improved except possible [possibly] by purchase, as to this they are not possessed of sufficient funds. The draft of a bill to authorize an extension till March 4, 1929, has been prepared and is submitted herewith.

It is respectfully recommended that the proposed bill or similar legislation receive favorable consideration by your committee and the Congress.

Very truly yours,

E. C. Finney,
Acting Secretary.